



National Wildlife Federation

National Advocacy Center

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February 7, 2019

Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building (Mail Code: 1101A)
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Re: Retain the Existing Clean Water Act Section 404(c) Implementing Regulations

Dear Acting Administrator Wheeler:

On behalf of our millions of members and supporters, the National Wildlife Federation urges you to retain the existing Clean Water Act Section 404(c) implementing regulations, and rescind the June 26, 2018 Memorandum issued by your predecessor (the “Pruitt Memo”) that directs the Office of Water to rewrite these regulations. The existing regulations have ensured careful, prudent, and highly effective use of the 404(c) authority for decades, and are a vital tool for ensuring continued progress towards the fundamental objective of the Clean Water Act – restoring and maintaining the chemical, physical and biological integrity of the Nation’s waters.

The revisions required by the Pruitt Memo are unlawful and unwarranted. Instead of engaging in this ill-advised rulemaking, your agency should focus its limited resources on addressing issues of critical concern to the public at large, including reducing nutrient pollution and the associated scourge of harmful algal blooms, cleaning up the thousands of miles of polluted rivers and streams, and protecting the nation’s remaining precious wetlands.

Poll after poll shows that the public overwhelmingly wants the clean, fishable, and swimmable waters promised by the Clean Water Act. Section 404(c) is a vital tool for fulfilling this promise for all communities by ensuring effective oversight of the 404 program and serving as an action of last resort to stop the most unacceptably damaging activities from destroying vitally important waters.¹

The Environmental Protection Agency has exhibited great restraint in its use of Section 404(c), using this authority to stop **just 13 of the more than two million activities** estimated to have been authorized under Section 404 in the 46-year history of the Clean Water Act. The vast majority of these 404(c)

¹ Despite the rarity of its use, Section 404(c) has “reinforced the program’s emphasis on the examination of alternatives and the redirection of development away from aquatic sites. Like a lone state trooper on a busy interstate highway, the mere presence of EPA’s authority tends to keep the level of speeding down.” O. A. Houck, & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242 at 1256 (1995) (internal footnotes omitted), available at: <http://digitalcommons.law.umaryland.edu/mlr/vol54/iss4/6>.

actions – 11 out of 13 – were issued under Republican Administrations.² Federal courts have upheld EPA's use of its Section 404(c) authority each time it has been challenged in court.

1. Regulations that Eliminate the Authority to Use Section 404(c) at Any Point in Time Would Violate the Clean Water Act

The Pruitt Memo directs EPA to develop and propose new regulations that would eliminate the authority to initiate the Section 404(c) process before a permit application is filed or after a permit has been issued. However, any such regulations would violate the unambiguous language of the Clean Water Act and could not withstand judicial scrutiny.

Section 404(c) explicitly states that EPA may veto a potential dredged material disposal **"whenever"** the Administrator determines that the discharge of such materials will have an unacceptable adverse impact on "municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." For decades, EPA has properly recognized that this Section 404(c) authority "may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued."³

That Section 404(c) grants the Administrator the authority to issue a veto at **any** time has been unequivocally confirmed by the U.S. District Court for the District of Columbia:

"Section 404 imposes no temporal limit on the Administrator's authority to withdraw the Corps's specification but instead expressly empowers him to prohibit, restrict or withdraw the specification *"whenever"* he makes a determination that the statutory "unacceptable adverse effect" will result. Using the expansive conjunction "whenever," the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any time*. Thus, the unambiguous language of subsection 404(c) manifests the Congress's intent to confer on EPA a broad veto power extending beyond the permit issuance. . . . As we have repeatedly stated throughout this opinion, the text of section 404(c) does indeed clearly and unambiguously give EPA the power to act post-permit."⁴

This ruling was reaffirmed in 2016:

"In *Mingo Logan II*, we held that the EPA could exercise this "backstop" authority both pre-permit and post-permit; that is, the EPA may prevent the Corps from issuing a 404 permit specifying a disposal site or it may withdraw specification of a disposal site after the Corps has issued a permit."⁵

² Seven of the vetoes were issued under the Administration of President Ronald Regan.

³ 44 Fed. Reg. 58,076 (Oct. 9, 1979); *City of Alma v United States*, 744 F.Supp.1546, 1588 (S.D. Ga. 1990) ("the EPA's regulations permitting section 404(c) action after permit issuance, and its action pursuant to them, are consistent with the intent of Congress expressed in the CWA.").

⁴ *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, 714 F.3d 608, 613 (D.C. Cir. 2013) (internal citations and footnotes omitted), *cert denied*, 572 U.S. 1015 (March 14, 2014). The court went on to rule that "[t]his construction is further buttressed by subsection 404(c)'s authorization of a "withdrawal" which, as EPA notes, is "a term of retrospective application." . . . EPA's power to withdraw can *only* be exercised post-permit." *Id.*

⁵ *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, 829 F.3d 710, 714 (D.C. Cir. 2016).

Regulations issued by EPA “must give effect to the unambiguously expressed intent of Congress,”⁶ and may **not** eliminate EPA’s statutorily-mandated authority to initiate the Section 404(c) process at any point in time.

2. The Existing Regulations Ensure Careful, Predictable, and Prudent Use of Section 404(c)

The Pruitt Memo contends that the directed changes are needed to ensure that EPA uses Section 404(c) “in a careful, predictable and prudent manner” and to “increase[] certainty for landowners, investors, businesses and entrepreneurs to make investment decisions”⁷ These claims, however, are directly contradicted by the terms of the existing regulations and the history of their use.

The 404(c) regulations, which have been in place since 1979, establish a careful, predictable and prudent process for determining whether 404(c) action is appropriate, whether permit modifications could provide the needed protections, or whether the activity can proceed as proposed. Under this process, EPA requires a **minimum** of six months to finalize its decision, and can often take even more time.⁸ As part of this process, EPA conducts an extensive scientific review of the activity’s impacts and develops a voluminous record to support its decision. The Corps of Engineers and the permittee are given at least two formal opportunities to revise the planned activity and/or permit conditions to prevent unacceptable harm. The public, the permittee, and the Corps of Engineers are also given the opportunity to provide their views during a formal public comment period. Recent vetoes have garnered the support of tens of thousands of members of the public and hundreds of independent scientists.

These regulations have resulted in 13 final determinations that have protected highly valuable and nationally significant resources:⁹

- In 2011, the Obama Administration used Section 404(c) to protect **6.6 miles** of some of the last remaining high quality headwater stream and riparian habitat in Appalachia. These headwater streams provide critical hydrologic and biological functions and important habitat for many wildlife species (2,278 acres of forested habitat were also protected). Spruce No. 1 Surface Mine, WV
- In 2008, the George W. Bush Administration used Section 404(c) to protect **67,000 to 200,000 acres**¹⁰ of some of the richest wetlands in the country located in the heart of the Mississippi River Flyway. Wetlands protected by this veto include 20,845 acres of publicly protected wetlands, including wetlands managed at the federal taxpayers’ expense for fish and wildlife habitat. This 404c action also saved federal taxpayers more than \$220 million in direct

⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

⁷ Pruitt Memo at 1-2, 4.

⁸ See 40 C.F.R. Part 232.

⁹ The impacts information discussed in this section can be found in each project’s Final Determination Under Section 404(c), available at <http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm>.

¹⁰ The Corps of Engineers concluded that 67,000 acres of wetlands would be damaged by this project but also acknowledged it had not evaluated the full scope of the wetland impacts from the Yazoo Pumps. While EPA adopted this number for its 404(c) determination, EPA and independent reviewers had concluded that the Yazoo Pumps would actually have drained and damaged 200,000 acres of ecologically significant wetlands.

construction costs and more than \$2 million in annual operating expenses. Yazoo Backwater Area Pumps Project, MS

- In 1990, the George H.W. Bush Administration used Section 404(c) to protect **300 acres** of wetlands and **30 miles** of the South Platte River, including 14 miles designated by the State of Colorado as a “gold medal” trout stream, 281 acres of riffle and pool complexes, and the Cheesman Canyon wilderness area. Two Forks Reservoir, CO
- In 1990, the George H.W. Bush Administration used Section 404(c) to protect **575 acres** of exceptional and diverse natural wetlands with provide habitat for a large assemblage of wildlife species. Big River Reservoir, RI
- In 1989, the George H.W. Bush Administration used Section 404(c) to protect a **425 acre** mosaic of high quality and regionally significant aquatic resources in the Chesapeake Bay watershed, including critical fish nurseries and Black Duck habitat. Ware Creek Reservoir, VA
- In 1988, the Reagan Administration used Section 404(c) to protect **1,155 acres** of bottomland hardwood wetlands that provide important habitat for a large assemblage of species. Lake Alma, GA
- In 1988, the Reagan Administration used Section 404(c) to protect **432 acres** of wetlands in the Everglades that provide vital fish and wildlife habitat, including habitat used by the Florida panther and four other threatened and endangered species. Henry Rem Estates, FL
- In 1988, the Reagan Administration used Section 404(c) to protect **58 acres** of wetlands within the Atlantic Flyway used by a multitude of State threatened and endangered species. Russo Development Corp., NJ
- In 1986, the Reagan Administration used Section 404(c) to protect **45 acres** of New England red maple forested swamp, including high-quality habitat for a variety of wildlife. Attleboro Mall (Sweeden's Swamp), MA
- In 1985, the Reagan Administration used Section 404(c) to protect **3,000 acres** of wetlands that are essential to the health of the Barataria Bay and that provide vital habitat for at least 70 species, including the American alligator, osprey, and wood duck. Bayou aux Carpes, LA
- In 1985, the Reagan Administration used Section 404(c) to protect **900 acres** of coastal intertidal marsh including valuable spawning and nursery grounds for blue crab and shrimp. Maybank Site, Jehossee Island, SC
- In 1984, the Reagan Administration used Section 404(c) to protect **25 acres** of forested and emergent wetlands that constitute one of the last remaining wetlands in the Mobile area. M.A. Norden Co., Inc., AL
- In 1981, the Carter Administration used Section 404(c) to protect **103 acres** of wetlands and other aquatic resources adjacent to North Biscayne Bay, including essential nursery grounds for

marine fish and invertebrates and important feeding grounds for two endangered species, the Eastern brown pelican and the West Indian manatee. North Miami Landfill, FL

Of these final determinations, just two were issued post permit.¹¹ In 1988, the Reagan Administration EPA used the 404(c) authority to rescind permits that had already been issued to Russo Development Corporation to protect vital resources in the Hackensack Meadowlands of New Jersey. This post-permit action was upheld by the Federal District Court in New Jersey.¹² In 2011, the Obama Administration EPA used its 404(c) authority to protect some of the last remaining high quality headwater stream and riparian habitat in Appalachia. This post-permit action, which was based on new and highly relevant post-permit monitoring and other data, was upheld by the Federal District Court in the District of Columbia.¹³

As these actions demonstrate, the existing 404(c) regulations have allowed EPA to protect an extensive array of nationally significant resources, while stopping just 13 out of more than two million Section 404 activities in the 46-year history of the Clean Water Act. The extremely limited use of Section 404(c), and the even more limited use of Section 404(c) pre- and post-permit¹⁴ application demonstrate that the existing 404(c) regulations are already satisfying the stated purposes of the changes that would be required by the Pruitt Memo—ensuring the “careful, predictable, and prudent use” of the 404(c) authority and providing certainty to the regulated community.

3. The Existing Regulations Provide An Important Framework for Protecting the Environment, Public Safety, and the Economy

The existing regulations provide an important framework for protecting rivers, streams, and wetlands that provide vital benefits to public health and safety, fish and wildlife, and the economy. Suggestions in the Pruitt Memo that some uses of Section 404(c) could stifle economic growth present a false narrative that ignores the critical ecological and public safety benefits of the wetlands, rivers and other waters protected through that authority—and the economic activity that those systems engender.¹⁵

¹¹ The 1988 Section 404(c) veto of the Lake Alma project in Georgia was also technically a post-permit authorization, but the permit had been enjoined pending completion of a court ordered supplemental environmental impact statement (SEIS). The veto was issued upon completion of that SEIS, and EPA’s concerns had been fully shared throughout the project’s prior complicated history.

¹² *Russo Development Corp. v. EPA*, 20 ELR 20938, 39 (D. N.J. 1990).

¹³ *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, 829 F.3d 710, 714 (D.C. Cir. 2016); *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, 714 F.3d 608, 615 (D.C. Cir. 2013), *cert denied*, 572 U.S. 1015 (March 14, 2014).

¹⁴ The Pruitt Memo refers to “two instances where the action extended to areas for which a permit application was not pending and other instances after a permit had been issued.” Pruitt Memo at 2. However, our detailed review of the 13 final determinations reveals that the two vetoes issued without a permit application covered federal civil works projects (Yazoo Pumps and Bayou aux Carpes) for which no permit would be required. As EPA is aware, Section 404 permits are not issued for Army Corps of Engineers’ projects (though such projects are required to comply with the substantive mandates of Section 404).

¹⁵ This contention also is not borne out by economic data. *E.g.*, <https://www.thebalance.com/us-gdp-by-year-3305543> (since enactment of the Clean Water Act, the nation’s nominal Gross Domestic Product, total economic output not adjusted for inflation, increased by more than 1423% from \$1.279 trillion to \$19.485 trillion).

The value to the economy provided by Section 404(c) is exemplified by the proposed determination for the Pebble Deposit Area in Bristol Bay Alaska.¹⁶ If finalized, this proposed determination would protect the habitat that supports the largest salmon fishery on earth and the source of over half of the world's supply of sockeye salmon. More than 62 million adult salmon returned to the rivers of Bristol Bay in 2018. These fisheries are a vital economic asset for Native Alaskan communities and many others in the region. The "commercial salmon fishery currently provides the region's greatest source of economic activity" providing an average annual commercial value of \$116.7 million from 1990 to 2010 (including \$114.7 million from the harvest of sockeye salmon) and directly employing "over 11,000 full- and part-time workers at the season's peak."¹⁷ Sport fishing also drives the region's economy, accounting for "approximately \$60.5 million in annual spending" and directly employing "over 800 full- and part-time workers."¹⁸

The wetlands and other waters protected by the 13 finalized 404(c) actions, and by Section 404(c) oversight, are also vital to the nation's economic well-being. For example, wetlands are an economic driver for fish and wildlife associated recreation. Hundreds of species of birds, waterfowl, and wildlife and 90 percent of fish caught by America's recreational anglers are wetland dependent. In 2016, fishing, hunting, and other wildlife-associated recreation contributed \$156.3 billion to the national economy. "This equates to 1% of Gross Domestic Product; one out of every one hundred dollars of all goods and services produced in the U.S. is due to wildlife-related recreation." Anglers alone spent "\$46.1 billion on trips, equipment, licenses, and other items to support their fishing activities" while people who "fed, photographed, and observed wildlife," spent \$75.9 billion on those activities.¹⁹

Healthy wetlands also provide critical protections to communities that allow the economy to thrive. For example, wetlands prevented \$625 million in flood damages in the 12 coastal states affected by Hurricane Sandy and reduced damages by 20% to 30% in the four states with the greatest wetland coverage.²⁰ Coastal wetlands reduced storm surge in some New Orleans neighborhoods by two to three feet during Hurricane Katrina, and levees with wetland buffers had a much greater chance of surviving Katrina's fury than levees without wetland buffers.

Notably, Administrator Pruitt's own actions belie his claim that "the mere potential of the EPA's use of its section 404(c) authority before or after the permitting process could influence investment decisions and chill economic growth by short-circuiting the permitting process."²¹ After carefully reviewing the record, Administrator Pruitt overturned his own proposal to withdraw the pre-permit proposed

¹⁶ U.S. Environmental Protection Agency, Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(C) of the Clean Water Act Pebble Deposit Area, Southwest Alaska, July 2014.

¹⁷ *Id.* at 3-39.

¹⁸ *Id.* at 3-44 to 3-45.

¹⁹ U.S. Fish and Wildlife Service, *2016 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation: National Overview*, Issued August 2017. This study is the source for all quotes and data in this paragraph.

²⁰ Narayan, S., Beck, M.B., Wilson, P., et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*. Scientific Reports 7, Article number 9463 (2017), doi:10.1038/s41598-017-09269-z (available at <https://www.nature.com/articles/s41598-017-09269-z>).

²¹ Pruitt Memo at 3.

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determination for the Pebble Deposit concluding that “any mining projects in the region likely pose a risk to the abundant natural resources that exist there.”²² This appropriate decision was announced in January 2018, months before release of the Pruitt Memo.

Conclusion

The National Wildlife Federation urges EPA to abandon efforts to change the regulations implementing Clean Water Act Section 404(c). The existing regulations have ensured “careful, predictable, and prudent use” of the 404(c) authority to clean up our waters, restore vital fish and wildlife habitat, protect drinking water sources, reduce wetland losses, and support water-based economies. EPA should instead maintain the integrity of Section 404(c) and the entire Clean Water Act to ensure the Act’s promise of clean, fishable, and swimmable waters can be achieved for all Americans, and focus its limited resources on protecting and restoring the nation’s waters and water quality.

Sincerely,



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²² U.S. Environmental Protection Agency News Release, *EPA Administrator Scott Pruitt Suspends Withdrawal of Proposed Determination in Bristol Bay Watershed, Will Solicit Additional Comments*, January 26, 2018 (available at <https://www.epa.gov/newsreleases/epa-administrator-scott-pruitt-suspends-withdrawal-proposed-determination-bristol-bay>); 83 Fed. Reg. 8668 (Feb. 29, 2018).